Case No.: 88-SWD-2 Date: 7/10/98

In the Matter of:

CATE JENKINS
Complainant

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
Respondent

Richard Condit, Esq.
Boulder, CO
For the Complainant

Joanne Hogan, Esq.
Washington, DC
For the Respondent

Before: JEFFREY TURECK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provisions of the Solid Waste Disposal Act ("Act"), 42 U.S.C. §6971 (1994), and five other environmental statutes.[1] The initial complaint in this case was filed with the United States Department of Labor on April 11, 1988 and was originally assigned to Judge Brenner. The case was then transferred to Judge Von Brand. On August 11, 1989 Judge Von Brand issued a *Recommended Order of Dismissal*, finding no jurisdiction because the respondent was a federal agency. On June 3, 1994 the Secretary of Labor issued an *Order* rejecting Judge Von Brand's recommended dismissal and remanded the case for further proceedings. Judge Von Brand had since retired and case was assigned to me on April 10, 1996.

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[1]This case also arises under the Clean Air Act, Safe Drinking Water Act, Water Pollution Control Act, Comprehensive Environmental Response, Compensation and Liability Act, and Toxic Substances Control Act. The Solid Waste Disposal Act is also known as the Resource Conservation and Recovery Act (RCRA).

Subsequent to 1988, numerous amended complaints were filed alleging additional discriminatory actions by the respondent. Four of these amended complaints were filed by the complainant on July 12, 1988, September 27, 1990, May 28, 1991, and November 13, 1991 while *pro se*. A fifth amended complaint was filed by her attorney on February 28, 1996. The February 1996 complaint did not allege any new violations subsequent to complainant's November 1991 complaint, but rather attempted to cohesively address all of the complainant's contentions in one document.[2]

A formal hearing was held in Washington, DC on the following dates: February 10-21, June 12, and June 27, 1997. The record was closed at the end of the hearing except for the filing of post-hearing briefs which were initially due September 30, 1997. The parties then were granted a two month extension of the deadline to file their briefs, until November 21, 1997. On November 17, 1997, the parties requested an additional extension of time, which was denied. Neither party filed its brief in a timely fashion. On December 10, 1997, I issued an *Order* closing the record. The parties filed a joint motion for reconsideration so that they could submit their untimely briefs. Reluctantly, I agreed to do so and gave the parties until December 12, 1997 to file the briefs. Both parties filed briefs by the close of business on December 12, 1997.[3]

Complainant contends that she engaged in protected activity when employed by respondent and was discriminated against by respondent as a result of that protected activity. Respondent denies that complainant engaged in protected activity under any of the Acts and furthermore states that any job-related actions involving the complainant were taken for legitimate, non-discriminatory reasons. Based on the evidence contained in the record of this proceeding, it is recommended that this case be dismissed.

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[2]In a later case brought by the complainant, Judge Glenn Lawrence issued a *Recommended Decision and Order* ordering, *inter alia*, that complainant be re-instated to her previous position, that respondent pay all fees and costs, and that complainant be awarded $10,000 in exemplary damages (*see Jenkins v. United States Environmental Protection Agency*, 92-CAA-6 (ALJ, Dec. 14, 1992)). This decision was adopted by the Secretary of Labor on May 18, 1994 (*see* 92-CAA-6 (Sec'y, May 18, 1994)).

No request was made by either the complainant or respondent to treat Judge Lawrence's decision as having a collateral estoppel effect on the instant case. *See, e.g.* ALJX 2 at 5-6. Further, regardless of whether collateral estoppel could have had an effect on this case had either party raised it, I find that the issues contested and relief requested in 92-CAA-6 are sufficiently different such that collateral estoppel would not apply.

[3]Despite the extensions of time ultimately granted to the parties to file their briefs, it is obvious that respondent's brief was hastily written, and calling it a half-hearted effort would be giving it too much credit.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[4]

A. Background

The complainant, Dr. Cate Jenkins, has worked as a scientist for respondent, the United States Environmental Protection Agency ("EPA"), since 1979. Complainant received her Doctorate in Chemistry from the Polytechnic Institute of New York in 1977 (TR 32). In 1980, she began working for the Listing Section of the EPA's Office of Solid Waste ("OSW") (TR 35). The Listing Section's function is to determine by industry what chemical waste materials should be classified as hazardous or acutely hazardous (TR 36-37). The beginning of the listing process requires chemical analysis of the waste materials as well as risk assessment, which is followed by publishing a regulatory proposal in the Federal Register (TR 36-37, 50). After the comment period, the agency comes to a consensus and the final rule is published (TR 36-37). Jenkins worked on a number of listings before experiencing any employment-related problems (TR 38-50).

1. Work on Wood Preserving Listings

The work-related problems that initially gave rise to this complaint stemmed from Jenkins' work involving the wood preserving industry (ALJX 1). In 1985, complainant worked on a project to develop new wood preserving regulations that addressed dioxin contamination, as required by the Hazardous and Solid Waste Amendments of 1984 ("HSWA"). From mid-1985 to mid-1986, the wood preserving project focused heavily on data collection (TR 63). Following the data-collection phase of the project, the regulatory package and support documentation was prepared (TR 66). During this time, complainant's chain of command was as follows: Robert Scarberry was her immediate supervisor as acting Section Chief in June 1986; Matthew Straus, the branch chief, was her second level supervisor; and Sylvia Lowrance was the division director and Straus' supervisor (TR 65).

Complainant submitted a draft wood preserving listing background document on June 23, 1986 (CX 11). At this time, the deadline for turning in the draft had already passed (TR 1840). The document was reviewed by Straus and Scarberry; Straus made extensive comments and notes on the draft (TR 75-76, CX 13). Complainant then worked on the second draft and wrote a December 1, 1986 memorandum to Scarberry and Straus stating that she would have the revised draft prepared in "two weeks or so" (CX 13). However, instead of submitting the draft by mid-December, Jenkins did not return the revised draft to the work group until early February (TR 1846). Scarberry testified that Jenkins signed his name to a letter attached to the revised draft without his permission (*id.*). Jenkins contends that Straus had authorized her to sign for Scarberry (TR 2006-08).

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[4]Citations to the record of this proceeding will be abbreviated as follows: ALJX -- Administrative Law Judge's Exhibit, CX -- Complainant's Exhibit; RX -- Respondent's Exhibit; TR-- Hearing Transcript.

During the time in which the two first drafts of the wood preserving document were prepared by Jenkins, a number of other events occurred that she raised as significant to this case. Jenkins wrote two letters to Congress reflecting her concern about the manner in which the EPA was addressing the issue of drinking water as it related to wood preserving wastes (TR 109-10, 1040). Complainant admits that the EPA was never aware of these two letters (Compl. Brief at 178). In June 1986, Jenkins' supervisors and an EPA contractor met with representatives of Weyerhauser Corporation while Jenkins was out of town (TR 70-71). This meeting was summarized for Jenkins in a June 6, 1986 memo prepared by one of the contractors who was assisting EPA on the wood preserving project (CX 162). In October 1986, Jenkins' supervisors met again with individuals from the wood preserving industry without Jenkins.[5] A memo was prepared by Jenkins on October 23, 1986 which expressed her concern over certain regulatory paths Straus had suggested after meeting with individuals from the industry (CX 5). Jenkins testified that she later discussed these concerns with Straus and they decided not to pursue the wood preserving industry's regulatory suggestions at that time (TR 89). On November 12, 1986 another meeting was held with members of both the wood preserving industry and environmental groups (TR 96). However, Jenkins believed this meeting was also inappropriate because she believed that regulatory proposals should be prepared internally (CX 6) and because she did not think other parties were given adequate notice and opportunity to attend the meeting (TR 96, *see also* CX 8).

In February of 1987, Jenkins learned that Scarberry had instructed the contractor Jenkins was working with on the wood preserving regulations, Dynamac, to prepare an alternate version of the wood preserving regulations which she believed was more lenient (TR 249). Jenkins believed these instructions were illegal under the requirements of the Federal Acquisition Regulations (FAR) (TR 248-49).

In response to Scarberry's contacting Dynamac, Jenkins wrote a memo on February 13, 1987 to Scarberry and Straus (CX 14) and a letter to Congress (TR 125). The memo and letter stated that Jenkins had not been informed of the re-evaluation of the listings by Scarberry (CX 14, TR 125-26). She also stated that the "proper forum for discussion of listings prior to first work group review is within the Agency" and that "[i]f either of you have problems with any of the listings, you should inform me either verbally or in writing" (CX 14 at 2). Finally, Jenkins expressed the opinion that Dynamac Corporation had prepared "incompetent and highly biased health summaries . . . for inclusion in the Federal Register notice" (CX 14 at 2-3). Jenkins did not believe that Dynamac evaluated carcinogens properly and explained that she and Dynamac disagreed on the issue of how carcinogens should be studied *(id.* at 3). The memo also acknowledged that Dr. Segal, a toxicologist at Dynamac, complained to the Office of Solid

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[5]Although complainant intimates that she was excluded from these meetings for nefarious purposes, there is no evidence in the record indicating either that the meetings were deliberately scheduled when she was unable to attend them or that it would have been normal agency practice for her to have attended these meetings.

Waste that Jenkins "had spent over $40,000 on trying to force Dynamac to evaluate substances such as carcinogens" *(id.* at 3). Jenkins testified that she wrote a letter to Congress "expressing my concern over the illegal instructions to my contractor to prepare an alternate, more lenient version of the wood preserving regulations" (TR 125-26).

Her supervisor, Scarberry, described a different version of events. Scarberry testified that he contacted Dynamac because he needed information about health assessment summaries on toxic constituents since that was holding up further work on the rule (TR 1845). He further stated that Jenkins, in his opinion, "did not utilize her contractors well" noting that she "used them for the most part as clerks and typists to do that type of work as opposed to doing a lot of the basic research" (TR 1850). He also stated that "these were the same contractors that we were using for a number of other listings and other staff people were perfectly satisfied with the technical support they got" *(id.).*

Shortly after February 13, 1987, the date of the memo to her supervisors and Congress, Jenkins began to tape record conversations with her supervisors. According to the EPA policy of the time, it was impermissible to surreptitiously record conversations (RX 67).

On February 19, 1987, the draft wood preserving regulations were sent to an EPA work group (TR 2094). The work group produced significant comments about the draft, and Jenkins wrote a May 5, 1987 memo responding to the comments (CX 27, CX 27-B). Scarberry's review of Jenkins' memo produced extensive comments, many asking her to elaborate further about the reasons why certain actions should be taken (CX 27-B). Scarberry stated at trial that he was not satisfied with her memo because in many circumstances the responses were "irrelevant or incomplete" (TR 1849).

Because of the varying comments that were received from the work group, Scarberry felt that it was necessary to prepare an options paper that would look at "all the issues objectively . . . so that the senior managers could discuss the pros and cons of the different options" (TR 1851). Accordingly, Scarberry wrote a memo to Jenkins on May 29, 1987 requesting that she write an options paper addressing certain issues and concluded by stating "[i]t is important that the issues as well as the pros and cons be presented as objectively as possible; no recommendation should be made at this time" (CX 29). Scarberry stated that while generally options papers take one to two weeks to produce, he asked Jenkins to use one of the contractors to speed the process because the rule was already a few months behind schedule (TR 1852). Jenkins perceived the issues/options paper as "a pick-and-choose vehicle for upper management to choose which regulatory course they wanted to utilize. . . . Eventually, what is required and what's wanted in the development of something like this is a consensus document. . . . They wanted the document to eventually focus and become so one-sided, although it gave the appearance of being an issue-options paper, an appearance of putting all relevant information in" (TR 1313).

On June 24, 1987, nearly a month after she was assigned the paper, Jenkins submitted a draft issue/options paper to Scarberry, Straus, and Lowrance (CX 30). Scarberry recalled that there were many edits of the paper and that the paper did not address certain topics, such as

stigmatization (TR 1853). The "stigmatization" issue was concerned with whether labeling certain dioxin wastes as "acutely hazardous" might have the effect of creating such a "stigma" for the wastes that it would become more difficult to dispose of these wastes properly -- for example, waste disposal facilities might refuse to accept “acutely hazardous” waste (TR 146-48). Jenkins' supervisors requested that she address stigmatization in re-drafts of the paper. In a July 15, 1987 memo addressing Matt Straus' comments on the paper, Jenkins stated:

> You have repeatedly given the "stigmatization rationale" as the major driving force for proposing concentration-based "acute hazardous" dioxin listings. . . . I believe that such considerations, even if true, should be deleted from the issues/options paper. Rationales such as this have nothing to do with the criteria for listing hazardous waste.

(CX 32 at 4-5). Jenkins also addressed Straus' request that she contact managers of off-site waste facilities to determine how many accept wood preservation/surface protection wastes and to conduct a survey to determine whether these wastes were already stigmatized. Jenkins's reaction to this request was to state:

> I do not believe that this is legal, since it also has nothing to do with the criteria for listing hazardous waste, and also since it would result in delays in the listing process. Our Office of General Counsel should give us a reading prior to performing these types of contacts or surveys.

CX 32 at 5.

On July 20, 1987, Jenkins had a conversation with Scarberry about the paper (TR 275). Jenkins taped this conversation without Scarberry's knowledge. In this conversation, Scarberry acknowledged that Jenkins felt uncomfortable writing about the stigma issue, but stated "[t]he problem I have is that, you know, he [Straus] expects me to come up with a briefing paper that addresses those stigma issues and capacity issues and so on, and you don't want to do it" (TR 276-77). Scarberry acknowledged that Jenkins was "in an awkward position because you feel like you're doing what's legal and what's right" (TR 278). However, he also stated that Straus had been at EPA a long time and knew some of the parties concerned better than Scarberry did (TR 278-79). Jenkins' response to this was "that doesn't mean that he is ethical, honest, has integrity and is doing the right thing" and then asked Scarberry "who's going to protect you better" (TR 279). Scarberry's reply was "I feel that Matt is -- I feel he has integrity . . . ." (*id.*).

In a July 21, 1987 follow-up memo about the conversation with Scarberry, Jenkins stated:

> Scarberry further told me yesterday that he believed that considerations outside of protection of human health and the environment (such as stigmatization and capacity) were in fact permissible considerations for listing hazardous wastes . . . . I strongly disagree with Scarberry's . . . interpretation of the §261.11(-a)(3)(xi)

> clause in the CFR, and request General Counsel's guidance. . . . The proper reading, I believe, would be the consideration of other factors that first must be related to health and the environment. . . . I further reason that if other non-health/environment criteria were in fact allowed by the clause . . . then we would be open to considering a wide, unlimited range of factors. For example, by Scarberry's . . . interpretation, §261.11(a)(3)(xi) could allow us to consider the color of the wastes (green toxics blend visually with the environment) or whether or not hazardous waste generators had contributed to someone's political campaign.

CX 33 at 2-3. A second draft of the issues/options paper was submitted by Jenkins on August 6, 1987 (CX 34). Matt Straus reviewed the 25-page paper and stated on page 23:

> Bob [Scarberry]: This is as far as I got. Although it is somewhat better, it is very much biased. IT NEEDS A FAIR ANALYSIS. It needs to be done and get out. I'll see you Thurs. or Fri. so we can discuss.

CX 34 at 23.

When she was asked to rewrite the paper again to address stigmatization, Jenkins refused, stating that she believed she was being asked to do something illegal (TR 1854). Jenkins drafted a memo to the Office of General Counsel asking them to address the stigmatization issue (TR 1854). This draft memo was sent to the division director, Lowrance, for her approval (CX 39, TR 1864). On September 29, 1987, Scarberry returned the draft memo to Jenkins with a note attached stating "Sylvia [Lowrance] is strongly opposed to sending such a letter" (CX 38). Lowrance testified that she did not sign it (TR 1710). She stated that she found the draft memo "silly" (CX 39, at 2), and:

> I decided it was not something that needed to be sent to our general counsel. My view at that time, and my view continues to be that policy work and technical work should be done looking at a broad array of options and variables in the agency, and that our rule-making process as set up in the agency involves a final concurrence from the Office of General Counsel. It's at that time that the legality of the particular options are ultimately arbitrated. It was my view that merely putting in an options paper, which was a policy options paper, the issue that had been raised and would continue to be raised within the agency was a way to get it to senior managers who have a right to know the facts and the issues that have been raised in rule-making.

TR 1710-11. Lowrance also commented at the hearing that "Office of General Counsel input is generally handled in a regulatory process in an informal basis, not through formal memos . . . [i]t does occur on occasion, but it's not the routine practice" (TR 1714).

On September 2, 1987, Scarberry wrote a memo to Jenkins stating that "in your . . .

memoranda to Matt Straus, you decided not to respond to comments provided by Matt and I by excluding certain issues from the June 24 version of the Options Paper . . ." (CX 42). He continued, stating:

> Your major objection to discussing these issues is that it is inappropriate and illegal to consider them as criteria for listing. You appear confused as to the purpose of the options paper and our interest in discussing these issues, as well as with your responsibilities as the work assignment manager of the wood preserving project. These issues will not be used to determine whether or not the wastes are hazardous. Rather, Matt and I feel that it is our responsibility to Agency decision makers to bring into focus any significant consequences that may result from our regulatory actions . . . . It is our General Counsel who will decide what are the appropriate factors for making listing decisions and how to regulate a particular industry (i.e., what regulatory authority the Agency should use to deal with risk). . . . It is your responsibility to prepare the technical supporting data for this regulatory effort in an objective and scientific manner, not to make policy and legal decisions that may censor important issues.

Jenkins stated that she was "shocked and flabbergasted" by this memo because she had been attempting to get an opinion from the Office of General Counsel for the two to three days prior to this memo (TR 222).

On September 3, 1987, Jenkins was removed from the wood preserving options paper (CX 43). The memo removing her indicated that Straus and Scarberry thought the options paper was poorly written and inadequately addressed the stigma and treatment/disposal issues (CX 43). It also stated that Jenkins did not make changes to the options paper so that it would be of "acceptable quality for senior management;" therefore, decision making was delayed (*id.*). Accordingly, Scarberry wrote that he would assume responsibility for the options paper to avoid further delay. However, he instructed her to continue to work on the appendices that would document the risk of wood drippage and runoff (CX 43). Scarberry later asked another employee, Ed Abrams, to write the paper (TR 1854). In a responding memo, Jenkins objected to Scarberry's criticisms of her work, and noted that "all of your and Matt's comments have consistently recommended less stringent options" and that "evaluation of who is biased or not cannot be made until the final regulation is promulgated, all legal suits settled, and public opinion codified after Congressional hearings" (CX 44 at 6). Around September 21, 1987 Jenkins was removed entirely from the wood preserving project (TR 349).

2. Denial of Within-Grade Increase and Unsatisfactory Performance Evaluation

In September 1987, Straus and Scarberry decided that complainant's work on the wood preserving project was unsatisfactory and denied her a within-grade increase (TR 1859-60). However, issues surrounding the within-grade increase first arose in June of 1987.

Jenkins testified that in June she entered Scarberry's office to use the word processor and found her within-grade increase form laying on a chair (TR 364-66). Jenkins stated that when Scarberry returned to the office she said "are you going to sign this, sign it, sign it . . . in a very light and bantering way" and that he did sign the form in her presence. Jenkins also testified that Scarberry post-dated the form because he wanted her to turn in the draft of the issues-options paper first (TR 366). Jenkins testified that she turned in the first version of the draft that evening (TR 366).

Scarberry testified that when he walked into his office and saw Jenkins with the form he questioned how Jenkins received it because generally these forms were marked "personal and confidential" and that she stated that "they must have sent it to her by mistake" (TR 1858). He stated that while he signed the form, he did not submit it and that he placed the form in his desk (TR 1858-59). During the entire month of August, Scarberry stated that he tried to decide what to do with the form because he had been complainant's supervisor for less than a year and the evaluation covered a two-year period (TR 1859). When he talked with Straus about this issue in July, Straus told him to wait to submit the form until they could evaluate Jenkins' performance on the options paper together *(id.)*. During the month of August, Straus was on vacation and when he returned Scarberry talked with him about Jenkins' performance on the options paper (TR 1860). He stated that he and Straus decided to give her an unsatisfactory rating on the wood preserving project, which accounted for more than 50 percent of the total evaluation *(id.)*.

In late August, Scarberry could not locate the within-grade increase form (TR 1860). Scarberry called Paul Jean, a personnel specialist at the EPA (*id.*). Jean instructed Scarberry to call the administrative office to request another form *(id.)*. When Scarberry called the administrative office he was informed that the form had already been submitted with a satisfactory evaluation (TR 1861). Scarberry called Jean back to ask him what he should do because he had never submitted the form. Jean told him that he could change the form to unsatisfactory (TR 1753, 1755, 1861). Jean testified that the Office of General Counsel agreed that this was acceptable because Scarberry had not submitted the form himself (TR 1753).

In a November 4, 1987 memo, Scarberry informed Jenkins that her within-grade increase had been denied because he found her overall performance to be unacceptable (CX 65 at 1). The memo explained Scarberry's problems with complainant's performance, including her consistently missing deadlines such as the 26-month delay on the wood preserving project *(id.* at 2). Scarberry stated that certain delays on the wood preserving project were caused by circumstances under Jenkins' control *(id.* at 2-4). The memo concluded by informing Jenkins of Scarberry's duty to make a new determination of Jenkins' level of competence within a year and of her right to request reconsideration of his determination *(id.* at 7). In addition to the denial of the within-grade increase, on November 12, 1987 Jenkins was given an unsatisfactory performance evaluation based on many of the same reasons as the denial of the within-grade increase, including poor quality work and missed deadlines (CX 66).

Jenkins filed for reconsideration of the denial of the within-grade increase on December 1, 1987 in a 65-page memo addressed to Straus (CX 80). Jenkins contested that the delay in the

wood preserving regulations was due to her participation in the project (CX 80 at 6-9). To all of Scarberry's critiques of her work, Jenkins replied with many pages of text explaining why she felt her work was not sub-standard or that the critiques were invalid *(see generally* CX 60). Jenkins then discussed her belief that she was unfairly treated on the issue/options paper because of her position on the stigmatization issue:

> The timing of the events described above support *[sic]* my contention that I was taken off the wood preservation/surface protection project because I questioned the legal basis for managements' *[sic]* decision to use "stigmatization" as a proper consideration in deciding how to regulate dioxin wastes. The timing of the events does not support the assertions in the November 4 denial that I was either biased or tardy in preparing the Issues/Options Paper.

CX 80 at 30.

Finally, Jenkins accused Scarberry of forging documents that were then placed in her personnel file "for the purpose of supporting the adverse personnel action of a salary increase denial and possible termination of employment" *(id.* at 51). She concluded the memo stating "because I believe the November 4 denial is connected with improprieties in the implementation of the Hazardous and Solid Waste Amendments of 1984, I believe it is appropriate to send this request for a reconsideration and its supporting documentation to the House Oversight and Investigations Committee" *(id.* at 63). In addition to sending this document to her managers and Paul Jean, Jenkins sent this document to Congressmen Dingell, Luken, and Florio *(id.* at 64).

Jenkins also filed a grievance on December 12, 1987 requesting both a reversal of the denial of salary increase and a written rebuttal to the allegations made in the November 1987 performance evaluation (CX 83-C). This memo stated that she not only wanted a response to this grievance, but to the allegations contained in the December 1, 1987 memo *(id.* at 1). In his response to her request, Scarberry stated that "since some of the text in your reconsideration request did not match my memory of certain events . . . I interviewed several people . . . . "(CX 81 at 1). He concluded after these interviews that his original assessment of her performance was accurate and that he would not reverse the denial of the within grade salary increase (*id.* at 1).

On January 27, 1988 Jenkins addressed a memo to Lowrance titled "Report of Knowing Falsification of Official Records" in which she accused Scarberry of the "surreptitious destruction of the official record of a within-grade salary increase which had been granted by normal Agency procedures" (CX 74 at 1). This memo also accused Scarberry of creating two fraudulent documents and placing them in her personnel record *(id.* at 2-4). Jenkins instructed Lowrance that "[i]t is currently your duty to assure the veracity and suitability of Scarberry, both as a supervisor and a government employee" (*id.* at 1). The memo concluded stating:

> I believe that a review by an unbiased official outside of my direct line of supervisors would show that Scarberry is not fit for the responsibilities entrusted

> to him of creating an official record for the Agency's decisions for the listing of toxic wastes as hazardous. What assurances could the public have that the records supporting RCRA hazardous waste listings are not the result of similar falsifications?
>
> I believe that certain senior EPA managers in OSW were not willing to admit to the policy change [to avoid stigmatizing these wastes], but were willing to distort the record which I assembled conscientiously. The record, as I left it, supported listing all of wood preservation/surface protection wastes examined as acutely hazardous under the RCRA statute. Present policy appears directed at options that would permit the continued management of these dioxin-contaminated wastes in unlined solid waste landfills and other land-based units.

Id. at 5. Lowrance did not respond to this memo (TR 604). Jenkins then brought this complaint to the EPA's Office Inspector General on February 10, 1988 (CX 75). Complainant testified that the Inspector General dismissed her complaint without addressing the allegations of forgery (TR 2054).

On March 11, 1988 Lowrance granted Jenkins' requested remedies by "directing that your annual performance rating be changed to satisfactory and that individual ratings . . . be raised to a satisfactory rating" (CX 83-A at 1). Lowrance also directed that the within-grade salary increase be granted with back pay *(id.* at 2). Lowrance stated in her memo that "this reconsideration . . . is prompted by my continued desire to seek an equitable resolution of this matter in order that all parties can focus on the important work our Division has to achieve in Fiscal Year 1988" (CX 83-A at 1). At the hearing, Lowrance testified that the reason that she granted these remedies was that she was leaving her position and she wanted to provide a clean slate for the individual who was going to replace her (TR 1716).

Jenkins informed Lowrance on March 17, 1988 that while she accepted this decision and did not intend to pursue the grievance procedure, she intended to pursue other remedies (CX 83-B at 1). Jenkins stated that:

> Unfortunately, your March 11, 1988 memorandum did not resolve any of the issues of concern related to the personnel actions taken against me. The only rationale you provided for granting my raise retroactively and removing unsatisfactory material from my file was that you wished to avoid the time and effort of pursuing the matter. This rationale is obscene.
>
> I will continue to pursue legal remedies to the many outstanding issues surrounding the personnel action implemented against me. The falsification of my personnel record (false certifications, illegal removal of my documents, creation of fictitious documents, etc.) necessary to support management's implementation of the personnel actions in the first place, must be resolved through the criminal investigatory process. . . . Illegal motivations for

> management for taking the personnel actions, such as covering up the poor scientific basis for a subsequent weakening of the wood preserving regulations, or retaliation against me for requesting oversight by the Agency's Office of General Counsel in the development of the regulatory documents, must be investigated. Redress of the defamation of character, pain and suffering caused by the wrongful personnel actions could be pursued by several mechanisms.

CX 83-B at 1-2. Jenkins did proceed to commence this whistleblower complaint on April 11, 1988 and filed another complaint with the Federal Labor Relations Authority, Region 3, on June 21, 1988 (RX 70).

3. Individual Development Plan

After the November denial of Jenkins' within-grade increase, she was subject to a review period in which she had to demonstrate her fitness to be a federal employee. This was known as an Individual Development Plan (IDP). One of complainant's initial responsibilities on the IDP was to prepare a work plan for herself for the period between December 2, 1987 and January 31, 1988 (CX 72, CX 73, TR 1866). On Jenkins' December 9, 1987 draft work plan, Abrams (who had replaced Lowrance) and Scarberry made extensive comments, including one comment stating "overall, a very poor job" (CX 73 at 1). Concerning these comments, claimant testified:

> Normally, if somebody wants you to make a change, they just circle it and put a little delete. . . . He's written very pejorative comments, but the changes he wanted, I could tell. He indicated exactly what changes he wanted. He wanted this sentence deleted, or don't put this kind of sentence in, or move this around or editorial [*sic*]. I just made the basically [*sic*] editorial changes that he wanted and pretty much just ignored all of this superfluous, rather absurd verbiage explaining why every little change he wanted was so - - why he thought it was so terrible and so bad.

TR 427. Scarberry testified that he and Abrams asked Jenkins to prepare the work plan twice, but that both attempts were of poor quality (TR 1866-67). They eventually prepared a work plan for her, to which she agreed (TR 1866-67, CX 72, CX 73). The final version of Jenkins' IDP was signed by supervisors Abrams, Scarberry and Straus, as well as Jenkins, and indicated that the period of evaluation was from December 2, 1987 to January 31, 1988 (CX 72 at 1). Though Jenkins stated that she never received any paperwork indicating that she completed the IDP period successfully, she realized that she must have done so because no other actions were taken concerning the IDP (TR 421).[6]

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[6]On January 7, 1988, while under her IDP, complainant filed an EEO complaint for sexual harassment against Scarberry for an innocuous comment about her smile This complaint was ultimately dismissed because it was not timely filed.

Jenkins was assigned to three main projects under the IDP: inorganic pigments and methyl bromide listing projects, and a solvents exemption project (CX 72). During the IDP period these projects were revised and she was removed from the inorganic pigments project (CX 289). The explanation for removal from the inorganic pigments project was that the funding was uncertain (CX 289, CX 290). Additionally, Scarberry stated that she was removed from certain other projects because "for one thing . . . we tried to make it easier for her by cutting the number of projects that she had to work on" (TR 1867).

Jenkins requested a mid-year review in April 1988. After becoming aware that Jenkins planned to tape record the mid-year review, Scarberry and Abrams refused to proceed with it (TR 623, 1868). Jenkins then filed a grievance against Scarberry on May 26, 1988 titled "Failure of Robert M. Scarberry to Provide Performance Standards and Mid-year Evaluation" (CX 212 at 1). In this grievance, Jenkins explained her belief that the tape recordings were legal and that "Scarberry is also aware that an outdated EPA policy under current revision permits surreptitious recordings of conversations in cases of threats and harassment" *(id.* at 2). She continued, stating:

> If Bob Scarberry believes that his privacy or rights are being violated in any manner by my tape recording my personnel meetings, he himself does not have the right to take action on his own. He must avail himself of the remedies available, which could include disciplinary action against myself or a suit in civil court for any invasion of privacy. The law and any EPA policy under revision do not indicate that he would have much success along these lines.
>
> Bob Scarberry does not, however, have the option of a "sit down strike" in retaliation for the recording of meetings, by refusing to perform his supervisory duties.

Id. at 3. Robert Dellinger, who became her supervisor around the time of this incident, said that:

> "[t]here was some -- for lack of a better word, I guess, controversy surrounding whether it was okay or not to audiotape such a mid-year, and to the best of my recollection, that had not been resolved within the agency in conversations between management and supervisors . . . and [the] Office of General Counsel and that had delayed -- because Dr. Jenkins, as I was informed, had wanted to audiotape those, it had not been resolved and so the mid-year could not have been conducted in the April-May time frame in which they're usually done, so it had carried over into the June time frame.

(TR 1801). Dellinger stated that a mid-year review was eventually performed by Scarberry while Jenkins recorded the proceedings, with Dellinger sitting in as an observer (TR 1802). Dellinger recalled that Scarberry rated Jenkins' performance at that time to be satisfactory or fully successful "whatever the term of art was at the time," but that at the beginning of the year it was not fully successful or satisfactory (TR 1802).

4. Reassignment to New Supervisor, 1988-1991 Work Activities

On June 10, 1988, Devereaux Barnes, the new director of the Characterization and Assessment Division, reassigned Jenkins so that she could retain her responsibilities but would be supervised by Bob Dellinger rather than Scarberry (CX 210, TR 1732-33). In his testimony, Barnes indicated that he reassigned complainant because of the pending sexual harassment complaint against Scarberry (TR 1731). Despite the fact that Barnes had assured himself that there was no sexual harassment "as far as [he] could tell" he recognized that Jenkins had a right to have the claim investigated *(id.).* Barnes also stated that the relationship between Scarberry and Jenkins had become "untenable" and was "impeding the flow of work in the division" (TR 1731). Barnes thought that by reassigning Jenkins to Dellinger, who he knew was an excellent supervisor, complainant could potentially work more productively (TR 1731-32). Jenkins testified that she was initially asked if she wanted to report directly to Barnes, but that she declined this offer because she wanted to continue with the listings work (TR 598-99). She further said that she did not "believe that I agreed to this," but rather that she "chose the lesser of two evils or three evils or four evils" (TR 1137-38).

Before the June 10, 1988 reassignment, one of the projects Jenkins was assigned to was a methyl bromide listing project. Jenkins was assigned to this project after she was removed from the wood preserving project and placed on the IDP (TR 437, CX 72). Complainant testified that after her reassignment she continued working on the methyl bromide project, but that the work was not substantive and required little of her time (TR 437). In May 1989, Jenkins wrote a memo to Dellinger stating "[t]he methyl bromide listing has been completed with all known issues resolved, and has been sitting in final form on your desk since July, 1988" (CX 241 at 1). Nevertheless, in the same memo Jenkins complained that she had too much work to do (*id.* at 3). Dellinger testified that while he did not recall the details surrounding the methyl bromide project it was possible that he did not perform work on the project until the end of 1988 (TR 1814). Dellinger also testified that during the summer of 1988 his immediate concern was medical waste that was washing up on New York and New Jersey shores which created a need to reorganize EPA divisions so that the work load would be level among the divisions (TR 1802-04). Barnes, who was Dellinger's supervisor, testified that Dellinger informed him that Jenkins was busy during this period (TR 1743), which is consistent with Jenkins' complaint that she was overworked.

In the mid-part of 1990, Jenkins commenced work on a solvents listing project (TR 681). Mike Petruska, another of her supervisors, assigned Jenkins this project, in which she was responsible for determining the information needs for listing certain solvents by specific dates as required by the HSWA of 1984 (TR 682). Jenkins wrote a memo to Petruska on May 24, 1990 detailing her belief that more solvents should be listed as hazardous under HSWA than the four solvents listed by the contractor working on the project (CX 267). Petruska testified that the "statute was not very clear" and that he believed it meant for EPA to conclude work that had already begun on solvents at the time HSWA was passed (TR 1583). Petruska expressed this position to Jenkins and she responded with a June 5, 1990 memo stating that his "theory is entirely incorrect that only the F005 solvents were under active investigation at the time HSWA

was promulgated" (CX 270 at 1). Petruska commented in writing on this memo, stating "I said the whole thing was unclear, and it is" (*id.*).

After receiving complainant's memo, Petruska forwarded it to Scarberry and Abrams and asked "Any thoughts?" (CX 271). Abrams replied:

> It depends on whether we want to satisfy the HSWA statute or make work for Cate with an unlimited budget for dioxin analysis. -- I think you (Mike P.) need to define the scope of her work very carefully or you'll create another monster. Maybe, Ron Josephson can help to define problems with the solvent regs. and Cate can fix them at the same time as an additional listing.

CX 271. Jenkins prepared a draft budget and planning document dated July 24, 1990 that addressed the expected costs for examining and studying new solvent listings (CX 273 A). This document estimated the total cost for the proposed project to be over $24 million (*id.* at 8). Jenkins' supervisors' comments on this draft budget included, "Where do these estimates come from? I would accept estimates only from TAB, they would do this work, not Cate" *(id.* at 6); "This is absurd" *(id.* at 7); and "This is a farce" *(id.* at 8). In an August 15, 1990 handwritten memo prepared by Petruska concerning Jenkins' work, Abrams wrote the following comment:

> I don't think Cate should be involved with anything that puts her in direct contact with the regulated community or the general public.

CX 335. In a note likely prepared at the same time, Petruska weighed the pros and cons of Jenkins working on various listings; his comment concerning the Solvents II project was "Don't need more data, wants to do s & a [sampling and analysis] to look for dioxin" (CX 336). Jenkins continued her work on the solvents listing and was instructed on August 30, 1990 that she should limit her focus to the four solvents listed in the Dynamac report until otherwise informed (CX 276).

Another project Jenkins worked on during this period was a chlorinated aliphatic hydrocarbon listings project. Jenkins testified that she first worked on chlorinated aliphatic hydrocarbon listings in 1981 (TR 40). In March 1988, Jenkins wrote a memo which raised her concerns about the possible presence of dioxins (CX 288). She testified soon after this memo the project "disappeared" (TR 702). In May 1989 Jenkins was again assigned to the chlorinated aliphatics listing project but declined work on the project stating that the assignment was "inappropriate" because it would "involve a major effort" and she already had a large work load (CX 241 at 2).

Jenkins also worked on an unsymmetrical dimethylhydrazine [UDMH] listings project in 1990. Jenkins wrote a memo titled "Information Needs for the UDMH Listings, Olin Process" on July 25, 1990 (CX 260). In this memo, she stated that "[t]he analysis for chlorinated dioxins and furans is justified in the absence of any definitive data to rule out their presence" and continued explaining her reasoning as to why the testing should be performed *(id.* at 2).

Petruska testified that he relied on the opinions of Scarberry and Abrams over the opinion of Jenkins in this matter (TR 1629).

On August 30, 1990 Petruska informed Jenkins that while she could continue the work on Uniroyal's UDMH listings, she should stop work on UDMH II because "[w]e may take the position that given the lack of data on the Olin process, that this is not a HSWA listing" (CX 261). Jenkins responded in a memo contending that despite Petruska's stated reasons for stopping work on this project, including a lack of funds and insufficient information to list the solvents without sampling data, the "real reason for not allowing sampling and analysis" was "a fear that my insistence on sampling for dioxins in both these types of wastes would in fact reveal significant concentrations" (CX 77 at 2).

Jenkins worked on another UDMH listing where a dispute existed between the EPA's Office of Solid Waste (OSW) and EPA's Office of Pesticide Programs (OPP) as to whether an existing cancer study, the so-called "Toth study," could be relied upon to characterize UDMH as a carcinogen (TR 631-45). Jenkins testified that the OSW believed the Toth study was adequate to establish the carcinogenicity of UDMH (TR 634-35). She also stated that line scientists in the OPP believed the study was adequate "though there were some method flaws" (TR 648). However, Dr. Jack Moore, the Assistant Administrator, Office of Pesticides and Toxic Substances, did not believe that it was adequate (TR 650-51). Jenkins described Dr. Moore as a "rogue high political appointee" who decided "unilaterally . . . that [the] older study is no good" (TR 650). Jenkins testified that the branch chief of OPP, Jan Auerbach, instructed Jenkins that the "manner in which the Office of Solid Waste should describe that older study was a political question, not a scientific one" (TR 638). Though EPA's Office of General Counsel offered to mediate this dispute, Jenkins did not feel this was proper because "the dispute was totally political and not scientific, and I believed that anything we wrote should be based totally on science and not trying to cover for this person [Dr. Jack Moore] who I believe had acted quite improperly in his unilateral reversal of UDMH carcinogenicity"(TR 1404). Jenkins told the attorney who had offered to mediate the dispute "that he was a service function to provide us legal assistance, and mediating between two offices when he did not even have a straddling position was inappropriate" (TR 647).

5. Complainant's Public Activities, 1988-1990

Jenkins participated in many activities that were not part of her official work duties which involved the public, environmental groups, and Congress. Some of these activities were a source of friction between herself, her supervisors, and her colleagues. On April 13, 1988 Jenkins sent a memo to EPA's Region 9 concerning the potential dioxin contamination of drinking wells in California (TR 571-72). Jenkins supplied a copy of this memo to her supervisors (TR 572-73). The Director of the Toxic and Waste Management Division of Region 9 explained in a response memo that the high contamination levels in the report were typographical errors and that the office did not need future input from Dr. Jenkins' office (CX 217 at 2).

Jenkins wrote a letter to the chairs of several Congressional subcommittees dated June 13, 1988 (CX 151). This letter accused the EPA of participating in the "cover-up and falsification of exposures from Superfund site," making "deals with industry for national wood preserving regulations," failing "to regulate other hazardous wastes," engaging in "reprisals against EPA staff scientist," and allowing "illegal use of public sector contracts" (CX 151). Complainant testified that she wrote the letter on EPA letterhead stationery and believed this was acceptable because the letter was not "personal," but rather concerned "an EPA matter" (TR 1061-62). Complainant further stated that she used the EPA letterhead to "imbue this document with as much authority to which I was entitled" (TR 1063, 1066). Jenkins provided copies of this letter to her supervisors (CX 151 at 22).

Jenkins wrote another letter to Congress on October 7, 1988 concerning her perception of "Consultant Abuses at EPA and Cover-Up" concerning Radian Corporation and provided copies of this memo to her supervisors (CX 157 at 1, 22). Jenkins testified that Congressman Pickle wrote to the EPA concerning the issues raised in the October 7, 1988 letter (TR 495). The letter stated that the Congressman was "concerned as to whether or not this document has been officially endorsed by EPA and what, if any, bearing this document will have on Radian's relationship with EPA" (CX 174). Radian Corporation also questioned whether the letter was the official position of the EPA (CX 176). On December 13, 1988 the Assistant Administrator of the EPA, J. Winston Porter, wrote the president of Radian to inform him that Jenkins' letter to Congress was not the "official policy of the U.S. Environmental Protection Agency," that the letter "was not reviewed by any of her supervisors or managers," and that the letter should only be considered representative of Dr. Jenkins' own beliefs, not those of the Agency (CX 177).

In November 1988, the EPA Inspector General's office commenced an investigation into the allegations raised by Jenkins in the October letter (CX 159). Jenkins testified that she declined to meet with the Office of Inspector General because she felt she "supplied them adequate documentation" and that they "could do their job without an interview" (TR 497-98). The IG's investigation was closed on July 6, 1989 because the investigation yielded "no indication of conflicts of interest with EPA assignments" (CX 158 at 3).

On April 30, 1989, Jenkins submitted a 132-page comment on the proposed wood preserving regulations that had been published in the Federal Register on December 30, 1988 (CX 191). Jenkins sent a letter to Congress the same day summarizing her concerns over the proposed regulations and attached a copy of her comments (CX 192). In this letter she stated that one of her concerns was that "EPA's responsibility to promulgate regulations . . . was subverted by Congressional intervention on behalf of the wood treating industry in the form of letters, and perhaps by other mechanisms" (CX 192 at 1). Apart from the addressees on the face of the letter, Jenkins provided copies of this letter to other members of Congress, the EPA Administrator, and to various public interest groups (TR 524).

Jenkins participated in a press conference with Greenpeace on December 5, 1989 which

concerned a Greenpeace report, *The Politics of Penta (*CX 195, CX 196).[7] According to Jenkins' testimony, this report generated a great deal more press coverage about the wood preserving issue than any other of the press avenues she previously had pursued (TR 546-47). Jenkins provided a copy of the press release and the report to her supervisors and notified them that she would be appearing on television that night (TR 536). Complainant alerted her supervisors to these activities because she "believed that it was important in employee discrimination cases at all times to ensure that your management was aware of your protected activity" (TR 536). Jenkins then sent a letter and *The Politics of Penta* report to Congress on December 21, 1989 (CX 197). This letter, written on EPA letterhead stationery, was captioned in bold typeface "Corruption by the EPA Inspector General in Investigating Criminal Acts by EPA Officials" *(id.).*

In February of 1990, Jenkins wrote a memo, which was based on a brief by a plaintiff in a lawsuit against Monsanto, to the chair of the EPA's Science Advisory Board (SAB) titled "Newly Revealed Fraud by Monsanto in an Epidemiological Study Used by EPA to Assess Human Health Effects from Dioxins" (CX 301). In this memorandum, Jenkins requested that the SAB perform an audit of the Monsanto dioxin studies *(id.* at 2-4). Jenkins included a copy of the plaintiff's brief with her memo *(id.* at 2). The director of the SAB, Donald Barnes, replied to Jenkins' memo stating that because the brief did not contain the references to which it cited, it was "difficult to put the argument in context or to bring it into perspective" (CX 302). Barnes also stated that the SAB generally did not perform study audits. However, Dr. Barnes did bring Jenkins' concerns to the attention of the National Institute for Occupational Health and Safety which was already conducting an investigation into occupational exposure to dioxin (CX 302 at 1).

Following this letter, Jenkins was contacted by Vietnam veterans groups who were concerned about dioxin exposure from Agent Orange (TR 729). Jenkins testified that she informed these groups about the EPA's activities and the EPA's stance on dioxins (TR 729). She also reviewed studies by the Centers for Disease Control (CDC) and informed these groups that she believed the CDC "had done all possible to avoid conducting a proper study" (TR 729-30). She also prepared an affidavit dated September 3, 1991 for use in the litigation that some of the veterans were pursuing (CX 309).

During the Spring of 1990, Jenkins was contacted by the staffs of Congressman Weiss and Senator Daschle (TR 725-26). When Senator Daschle testified before the House Veterans Affairs Committee concerning compensation for Vietnam veterans exposed to Agent Orange, he stated that:

[a]lthough the government has consistently cited the Monsanto study as strong

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[7]"Penta" is an abbreviation for Pentachlorophenol, "an organic chemical produced by reacting chlorine gas with phenol, used primarily in the U.S. for wood treatment." (CX 196 at vii)

> evidence against Agent Orange disability claims, the Illinois trial has revealed the fact, confirmed by an EPA scientist, that the study, if conducted properly, would have actually supported the veterans' claims.

CX 304 at 2. Jenkins testified that she was the EPA scientist to whom Senator Daschle was referring (TR 727). Complainant also stated that she assisted the state of Alabama in petitioning the EPA to develop more stringent standards on dioxin (TR 750).

Jenkins' allegations against Monsanto generated extensive media coverage both inside and outside the environmental community (CX 342-55, 358-86, 388-89, 391). Jenkins testified that she believed the press coverage had a negative impact on her job and her status within the agency (TR 758-59). However, she also stated that:

> [n]othing was said adversely to me at the time, in the time period 1990-91, but I knew that my superiors knew about the television press coverage, because they would see these very large television crews coming into my office at EPA.

TR 759. Jenkins testified that she felt she was stigmatized because of her activities with the public and the press because she felt she was not given any new duties during this time period (TR 760).

Dr. Jenkins met with two agents from the National Enforcement Investigations Center (NEIC), a division of the EPA's Office of Criminal Enforcement, Forensics and Training, concerning her allegations of fraud (TR 732). After this meeting, Jenkins wrote two follow-up memoranda to the NEIC, one dated November 16, 1990 and the other dated January 24, 1991, detailing how she believed the alleged Monsanto fraud affected the EPA regulatory process (CX 305, CX 307). She sent copies to a number of outside parties (CX 305 at 6, CX 307 at 9-10). After writing the first memo, Jenkins was contacted by one of the investigators and asked not to reveal that there was an ongoing criminal investigation (TR 1206-07). Jenkins informed the investigator that she already had spoken to a veteran's group and sent copies of her memo to outside groups which revealed a criminal investigation was underway (TR 1207). She told the investigator there "was no way I could honor his request at this point, whether or not I agreed with whether or not such a request was appropriate" (TR 1207-08). Jenkins' supervisor, Mike Petruska, testified that he considered disciplining Jenkins for publicly revealing an ongoing criminal investigation because doing so violated EPA policy (TR 1574). However, Petruska decided against disciplining Jenkins because the policy had not yet been codified as a regulation in the Code of Federal Regulations (TR 1574-75). Jenkins had no further contact with the NEIC after the second memo was sent (TR 758).

Monsanto wrote its first letter to the EPA about Jenkins' fraud accusations on March 26, 1990 (CX 321). Monsanto stated its concern that Jenkins' memo, which was characterized as "simply parroting unsupported arguments contained in a plaintiff's brief," was now being viewed by the media as the official EPA position *(id.).* The assistant administrator of the EPA, Don Clay, responded with a letter stating that Jenkins' memo reflected only her opinion and not that

of the EPA and regretted "any problems that Monsanto may have had as a result of the news media's use of this memorandum" (CX 321).

Monsanto wrote a second letter to the EPA on April 8, 1991 which also was concerned with Jenkins revealing the preliminary criminal investigation to the public (CX 305). The letter stated in part that:

> [O]ur basic frustration with this investigation does not extend to the EPA criminal program's handling of this matter. However, this investigation has become a media event through the unprofessional efforts of a single EPA employee not resident in the criminal program. Specifically, memoranda . . . prepared by this employee detailing many untrue allegations provoking the investigation have been improperly released to the public . . . and, consequently, have been widely discussed in the lay and scientific press.

CX 323 at 1. In a third letter on November 15, 1991, Monsanto's attorney expressed more concern over "Dr. Jenkins' insistence in a continued public discussion of the matters addressed in . . .her affidavit" (CX 324 at 1). This letter stated that:

> it is highly inappropriate and a violation of the agency's responsibility . . . for an employee publicly to discuss matters of the type to which Dr. Jenkins refers. This is the third occasion on which this has happened.

CX 324 at 1. Jenkins testified that she learned in 1992 that both the Department of Justice and the EPA's Inspector General's office investigated possible personnel actions that could be taken against complainant for publicly revealing the ongoing investigation of Monsanto (TR 742). The EPA's Office of Enforcement also addressed Jenkins' violation of EPA policy and requested that appropriate administrative action be taken (CX 326). However, no formal personnel action was taken.

Jenkins' performance standards for FY 1991 included "Agency policies concerning communicating with the public are followed" as a criterion required for an outstanding or fully successful rating (CX 334 at 6). Petruska, complainant's supervisor, testified that he believed she was the only person in the office who had this criteria listed on her performance rating (TR 1632-33). Jenkins believed that her performance rating of "fully successful" rather than "outstanding" for FY 1991 was based on the "follows agency policies on communications" criterion (TR 737). However, Petruska testified that he used many different criteria in determining Jenkins' performance evaluation for that year and not just "one thing" (TR 1600-01).

b. Discussion

1. Complainant's Credibility

Claimant's credibility is the key issue in this case, both because there is frequent conflict between her version of events and that of other witnesses and because her perception of events is the principal component in her belief that she has been discriminated against for her protected activities. Accordingly, much of this part of the decision will address claimant's credibility.

Getting right to the point, Cate Jenkins is the most disingenuous, evasive, and self-serving witness I have ever observed. She is an intense woman who believes that any means are acceptable if, in her view, the ends are desirable, including lying (even under oath), searching through co-workers' personal effects, and leaking confidential information. She further believes that any person, rule, or law which stands in her way can be ignored. She has acted and continues to act as if she believes she is the only person at EPA who is concerned with the public interest and everyone else is selling out to the industries regulated by EPA. Accordingly, she irrationally assumes that every criticism of her job performance, no matter how obviously valid, is part of a plan to impede her efforts to protect the public and the environment. It does not appear to have entered her mind that proposals which differ from hers may nevertheless be meritorious or even worthy of consideration, nor does it appear to have occurred to her that her "ends justify the means" philosophy may compromise both her credibility and that of the EPA. Dr. Jenkins' sanctimonious, condescending, and distrusting attitude toward her colleagues made it inevitable that serious problems would develop in her employment relationships.[8]

What makes the foregoing particularly lamentable is that Dr. Jenkins is without doubt an extremely intelligent woman and a capable chemist. Her near photographic memory was demonstrated repeatedly at the hearing (when it suited her convenience) through her uncanny ability to instantaneously identify the exhibit numbers of documents and to locate particular passages in these documents. This was all-the-more impressive when it is considered that complainant had marked almost 400 documentary exhibits taking up five loose-leaf binders. Moreover, she firmly believes in the mission of the EPA, and in that respect is well-intentioned. But she is so lacking in judgment that she actually has made it more difficult for EPA to accomplish its mission.

Complainant's utter lack of credibility could only truly be appreciated through personally observing her six days of testimony. I do not often rely solely on demeanor in determining a witness's credibility, but the complainant's demeanor was so disquieting that it is dispositive here by itself. Complainant often appeared to be in her own world, divorced from reality. She frequently answered questions with long discourses that quickly became unfocused. During her period on the witness stand complainant lied with impunity and did not appear the least

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[8]Complainant appears surprised that her relationship with her then-supervisor, Matthew Straus, began to deteriorate in October 1986 after she wrote a memo which was critical of Straus. *See* TR 767. Likewise, complainant seems not to have drawn a connection between her bizarre behavior at work, such as searching through colleagues' offices, brandishing a fake pistol and disclosing the existence of a confidential criminal investigation, and her estrangement from the EPA staff. *See* TR 790-92.

embarrassed when she was caught in these lies (*e.g.*, TR 968-82, 1014-17). She bragged about her bizarre behavior which she seemed to have no idea was in any way aberrant or unusual (*e.g.* TR 1245-55). In addition, she had alleged lapses of memory on unfavorable points so frequently that it was obvious the problem was one of honesty rather than memory. She has her own moral standards which are not in accord with those of the rest of society. She has no concept of team or organization, refuses to recognize the authority of her supervisors, and has no sense of loyalty to anything other then herself. She also has an enormous ego. When Thoreau wrote supportively about marching to the beat of a different drummer, I do not think this is what he had in mind.

Examples of these points abound. Complainant made it a practice to snoop through other people's offices (TR 1245-55). When confronted about this by Scarberry, she justified her actions by stating "if anything's private, you should keep it locked up." (TR 1245-46) She stated that starting in late 1987 she "was in a data collection mode . . . ." (TR 1247). When asked whether she went through her co-workers' files, she testified:

> Yeah. After November of '87, I was very diligent in looking at anything around, you know, that was coming in, the general mail or the branch files or anything like that, yes. Anything that was being sent out -- if something was put on a secretary's desk[,] in her Xerox ... box, I would go through that.

(TR 1248). She also admitted going through a file that was in a credenza in Petruska's office and removing some documents from that file to copy them (TR 1249). She subsequently stated that she might have been going through her co-workers' files as early as June 1986 (TR 1251), and apparently she continued her snooping at least through December 1989, when she removed a document from Sylvia Lowrance's in-box (TR 528-32). Thus it would not be surprising if the complainant went through Scarberry's desk to retrieve the within-grade raise form he signed but did not turn in, and turned it in herself.

Not only did complainant snoop through other people's files, but as above noted, she surreptitiously recorded her conversations with co-workers and supervisors. Although complainant alleges that she was unaware until 1988 of the longstanding EPA Order prohibiting its employees from secretly tape-recording conversations *(see* RX 67), her testimony is not believable. Complainant was aware of every statute, court decision, and regulation which supported her actions, whether in regard to the secret taping of telephone conversations, stigmatization, or the leaking of confidential information *(see, e.g.* TR 309-10, 1054-56, 1145-49). It is simply not believable that she was unaware of a specific EPA Order directly on point in this regard. More likely, she simply ignored the EPA Order, rationalizing that it was either outdated or somehow did not apply to her (TR 1145-51).

An enlightening incident related to the complainant's surreptitious tape recording is that on May 16, 1988, complainant wrote a memo to then-EPA Administrator Lee Thomas requesting that the EPA Order banning secret tape recordings be immediately retracted (CX

222). In this memo, complainant stated that:

> A few years ago, I was informally advised by law enforcement officials and legal associates that carrying a surreptitious tape recorder was legal and a good idea *since I was receiving death threats associated with my professional duties.*

(Id. at 1) (emphasis added). She also stated in a letter she wrote to several Congressmen that she was a victim of "inferential death threats"(TR 1021), and informed co-workers of these death threats as well (TR 1022). But she admitted on cross-examination that she never received any death threats (TR 1025-26; *see also* TR 2083). In fact, she never received any threats at all.

Complainant also contends she was unaware that it was impermissible for her to send out her own unauthorized letters to members of Congress, government agencies, the media, and environmental groups on official EPA letterhead stationery (TR 656; *see CX* 151, 157, 250). In fact, she argues that EPA policy permitted it (TR 1059-61). But she is lying. She admits that Scarberry, who was her supervisor at the time, informed her that her April 13, 1988 memo to EPA Region 9 was improperly written on EPA letterhead stationery because it contained her personal opinion (TR 1068-69). Further, she admits she used EPA letterhead to give her letters more authority (TR 1066); and her testimony that she accidentally used the letterhead stationery of the EPA Administrator in her February 7, 1990 letter regarding the Toth study of dioxin toxicity (CX 250) is laughable (TR 1070-71). It is clear that complainant deliberately used EPA letterhead stationery to make it appear that her letters stated the position of EPA and did not care that it was improper to do so, in effect daring EPA to do something about it. Nothing was done.

Similarly, complainant was called by Special Agents of EPA's National Enforcement Investigations Center in November 1990 to set up an interview to discuss her allegations that Monsanto Company falsified health studies regarding the effects of dioxin *(see, e.g.* CX 301). Apparently, based on this telephone call, complainant adduced that NEIC was conducting a criminal investigation of Monsanto, and almost immediately disclosed this in a speech to a Vietnam veterans organization (TR 1201-04).[9] Although on December 22, 1989, EPA had issued a series of memoranda informing its staff not to disclose the existence of ongoing criminal investigations (CX 332), complainant alleges that at this time she did not know it was against EPA policy to do so (TR 737-38, 1210-12). However, she met with the NEIC agents on November 14, 1990, and at that meeting she was told not to discuss the investigation with anyone (CX 326; TR 1575). Notwithstanding this instruction, complainant prepared a memo for the NEIC agents on November 15, 1990 reiterating the substance of her complaint against Monsanto, and sent copies of this memo to 16 people or organizations outside of EPA, including environmental and veterans' groups (CX 305). Although complainant contends -- I believe untruthfully -- that she was not informed of the non-disclosure policy until after she sent out this

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[9]Dioxin toxicity is a concern to Vietnam veterans because dioxin is a major component of Agent Orange, a defoliant used during the Vietnam War which is suspected of being the cause of health problems which have arisen in Vietnam veterans. *See,* e.g., CX 196.

memo (TR 1207), complainant concedes that she was aware of this policy by January 24, 1991 when she wrote a follow-up memo to the NEIC agents (CX 307). Nevertheless, she sent copies of this memo to the same people and organizations to whom she sent her November 5, 1990 memo (TR 1207-08). Complainant's tortured explanation of why she made this memo public despite specifically being instructed not to make further disclosures regarding the investigation is illustrative of how out of control she was by that time *(see* TR 1206-19).

Other examples of complainant's character which deserve notice are illustrated by the following incidents:

-- Complainant was calculating enough to notify her supervisors when she was engaging in protected activity, believing that if they were aware she engaged in protected activity it would be more difficult to take action against her. She stated that "it was important in employee discrimination cases at all times to ensure that your management was aware of your protected activity." (TR 536; *see* TR 537-38).

-- In a May 17, 1989 memo to Dellinger summarizing the status of her work on the methyl bromide and UDMH listings (CX 241), complainant became extremely defensive. She complained she was being assigned an "inordinate work load" *(id.* at 3), lashed out at Dellinger for plotting against her, and offered a number of excuses why the work was not going to be completed on time. She added that, "[a]s I told you on May 12, my first priorities will not be any HSWA listing work, but instead pursuing my EEO and DOL complaints" *(id.* at 2). Conversely, at the same time complainant was alleging that she had little to do (TR 437).

--The adulation, attention, and publicity complainant received from the media, special interest groups, and Congress for her public criticism of her employer and disclosure of confidential information was very important to her, apparently more important than performing the job she was being paid to do at EPA. She was proud of being labeled a whistleblower. Complainant not only collected all the articles she could find criticizing EPA's regulation of dioxin and the wood preserving industry in which her name is mentioned *(e.g., CX* 6, 153, 154, 171, 178-80, 195-96, 199-201, 203, 205-07, 342, 345-64, 366-86, 388-89, 391), but usually she both starred and underlined her name in these articles. Several of these publications include her picture, and a report by the environmental organization Greenpeace regarding a wood treating pesticide is virtually dedicated to her *(see* CX 196, at 1-4). She even received an award from a Vietnam veterans' organization (TR 777). She exulted in her television appearances, and made sure everyone was informed of her media coverage *(see, e.g.* TR 474-82, 535-36, 546-47). It is also revealing that complainant referred to the wood preserving regulations as "my wood preserving regulations" (TR 127) ten years after being removed from the project.

--Complainant's refusal to acknowledge, let alone accept, criticism is astounding. Despite all the criticism complainant received for her work on the wood preserving listing, when she was asked to fill out her performance evaluation for the year October 1, 1986 through September 30, 1987 she gave herself a perfect rating, 500 out of a possible 500 points. On the other hand, her supervisors, Scarberry and Straus, rated her unsatisfactory, 190 out of 500 (*see*

CX 66). In this performance evaluation, complainant's supervisor, Scarberry, stated that he "had to rewrite a poorly written memo . . . that [complainant] would not deal with" *(id.* at 5). Complainant concedes that the memo had both grammatical and spelling errors but, noting that *Spellcheck* was not yet available, argued that "it was really an unreasonable thing to fault an employee for." (TR 840-41). Even more extraordinary testimony concerned the issue/options paper for the wood preserving listing that Scarberry instructed complainant to draft by May 29, 1987 (CX 29). Complainant's Exhibit 30 is a copy of her June 24, 1987 35 page first draft of this issue/options paper. The margins of this memo contain extensive hand-written notes from Straus, who at that time was the Branch Chief and Scarberry's supervisor. There are at least some comments from Straus on all but one page of the memo. In many places he says that he does not understand her point *(e.g.*, CX 30, at 11b, 12). Other representative comments are "This issue needs lots of work" *(id.* at 19); "So what?" *(id.* at 12, 22); "I don't think this is true" *(id.* at 30); "This is not a disadvantage -- this is an opinion" *(id.* at 23); and "NO!!" *(id.* at 7). In addition to his comments, there are many places where parts of the memo have been crossed out; on one page three full paragraphs have been crossed out. On the cover sheet to the memo, Straus wrote to Scarberry: "Bob: I've started to look at this. It needs a lot of work."

In testimony regarding Straus's criticism of this memo (TR at 813-14), complainant stated that:

> there was no indication and he did not in any way state this is poorly written or this is biased or anything like that. He provided no indication that he was dissatisfied. He did want changes, this is true, but there was no expression of dissatisfaction of my performance per se.

Id. There is nothing further to say.

-- When complainant was removed from the wood preserving listings project in September, 1987, she had to transfer the files from that project to the contractor. The files consisted of 40 file drawers. Prior to transferring the files, complainant went through all of them and made copies for *her own personal records* of those documents which she believed "would be most useful to me . . . ." (TR 349-50). Although she stated that she did not copy all of the documents, the impression given was that she copied more than she omitted. This was done during work hours, and presumably on EPA's copying machines at agency expense *(id.)*. Although complainant rationalized that it was permissible to do the copying during work hours by alleging that she had no other listing projects at the time (TR 349), she did not explain why she believed it was proper to make copies for her personal use at EPA expense.[10] More important, she did not explain who authorized her to copy documents in EPA's files for her personal use. Neither of these issues seems to concern her.

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[10]We are not talking about a handful of personal copies that someone might make on his or her employer's copying machine for the sake of convenience. It is likely that complainant copied tens of thousands of pages of EPA documents.

-- Jenkins was asked how long it took her to return a project that she stated in a letter to her supervisor she would return in "two weeks or so" (CX 13). Jenkins became very defensive when she answered this question, stating that she did not mean two weeks, she meant “or so,” and that it should have been apparent to her supervisor that she did not mean two weeks (TR 983-87). Her explanation of her interpretation of "two weeks or so" is both disingenuous and absurd. Also, the manner in which Jenkins answered the question is revealing -- she turned a simple, non-contentious question into a lengthy, argumentative, unreasonable answer.

--Jenkins appears to believe that anyone who criticizes her work or holds a different viewpoint on certain environmental issues is either out to get her or is breaking the law. This undoubtedly explains why she surreptitiously taped some conversations with her supervisors (in violation of EPA policy) during the years in question. Jenkins also appeared to be unreasonably resentful of individuals who started in the same staff position that she did and were eventually promoted to supervisory positions, particularly those who ultimately became her supervisors. Jenkins' testimony and demeanor seemed particularly hostile towards Robert Scarberry, her primary supervisor during the years in question. It was clear that Jenkins believed that Scarberry should not have been promoted and that she should have been, despite the fact that Jenkins testified that she missed the application deadline for that promotion (TR 1883-84). It may not be coincidental that complainant's aberrant work performance began at the time Scarberry became her supervisor.

--It was clear from Jenkins' own testimony that she had difficulty getting along with her co-workers. Many of Jenkins' own actions contributed to the discordant office environment, including her surreptitious taping of conversations and phone calls which was eventually discovered (TR 247-48), her bringing media crews to the office to tape her opinion concerning controversial subjects (TR 759-60), her demeaning description of her supervisor, Robert Scarberry, to others in the office (TR 1160-61), her looking through support staff's in-boxes to collect data (TR 1245-55), her reading of papers left out on people's desks in their offices (*id.*), and her filing of numerous grievances and lawsuits. Jenkins’ apparent lack of awareness that these actions, meritorious or not, could lead to a tense work environment lessens her credibility as a witness. Jenkins was and clearly continues to be very emotionally involved with this case. The longer she testified, the more rambling and accusatory her testimony became. She is so emotionally involved that she can not possibly be objective.

In sum, I find that her testimony was inherently unreliable, and absent corroborating evidence is insufficient to establish any controverted fact.

2. Merits of 1987 Allegations[11]

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[11] While the timeliness of the complaint was raised initially as an issue, neither party raised it at the hearing, and the respondent devoted only a short paragraph in its brief to the issue. Therefore, it is unclear whether timeliness continues to be an issue. Further, a discussion

Under the Solid Waste Disposal Act:

> [n]o person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter or under any applicable implementation plan, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter or of any applicable implementation plan.

42 U.S.C. § 6971 (a) (1994). The other environmental statutes under which complainant has filed this claim have similar employee protection provisions.

To prevail under the environmental whistleblower statutes, including the Solid Waste Disposal Act, a complainant must establish that: (1) the complainant engaged in protected activity, (2) the employer knew of the complainant's protected activity, (3) an adverse employment action was taken, and (4) the adverse employment action was motivated, in whole or in part, by the complainant's protected activity. *See Dartey v. Zack*, 82-ERA-2 (1983); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984). If the complainant is successful in proving these points, the burden then shifts to the respondent to produce evidence that the adverse action was motivated by a legitimate, non-discriminatory reason. *See Guttman v. Passaic Valley Sewerage Comm'rs v. Department of Labor*, 85-WPC-2 (1992), *aff'd sub nom, Passaic Valley Sewerage Comm'rs v. Department of Labor,* 992 F.2d 474 (3d Cir.), *cert. denied*, 510 U.S. 964 (1993). If the respondent is successful, the complainant then must prove that the respondent's asserted reason for taking the adverse action is not the true reason, but rather is a pretext for retaliation. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

For the purposes of this decision, it will be assumed that the complainant's activities were protected and that the Environmental Protection Agency was aware of the complainant's activities. Therefore, this decision will discuss only the next two elements required for complainant to meet her initial burden. First, whether adverse actions were taken against the complainant, and second, if adverse actions were taken, whether they were in retaliation for the complainant's having engaged in protected activity.

"An adverse action is simply something unpleasant, detrimental, even unfortunate, but not necessarily (and not usually) discriminatory." *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1573 (11th Cir. 1997). Clear examples of adverse employment actions

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of the timeliness of the complaints is very complicated, since six separate complaints were filed and issues such as the continuing violations theory would have to be addressed. Regardless, because it is recommended that the complaints be dismissed on the merits, there is no reason to discuss the timeliness question, and it will not be addressed in this decision.

include dismissal, demotion, or an involuntary transfer to a less desirable position. *See Mandreger v. Detroit Edison Co.,* 88-ERA-17 (Sec'y, March 30, 1994); *Nichols v. Bechtel Constructors, Inc.,* 87-ERA-44 (Sec'y, Oct. 26, 1992); *English v. General Electric Co.,* 85-ERA-2 (Sec'y, Feb. 13, 1992). Monetary loss is not required. *See Boytin v. Pennsylvania Power and Light Co.,* 94-ERA-32 (Sec'y, Oct 20, 1995).

Complainant contends that she was subjected to five adverse actions that precipitated the filing of the original April 11, 1987 complaint. These actions include: 1) removal from the wood preserving issues/option paper in September 1987, 2) removal from the wood preserving listing project in September 1987, 3) denial of a within-grade increase in November 1987, 4) being given an unsatisfactory performance evaluation in November 1987 and 5) a March 1988 elevation of an unsatisfactory evaluation to "satisfactory," rather than "exceeds expectations."

a. Removal from Wood Preserving Options Paper and Listing Project

The record contains ample evidence that Jenkins' protected activities, such as writing letters to Congress, were not the reason for the adverse actions taken against her in September through November of 1987. While it was permissible for Jenkins to write letters to Congress and to her supervisors expressing her concern over the regulatory course that was being explored, her refusal to address certain issues in her work assignments that her supervisors instructed her to address was not acceptable. Jenkins certainly was under no obligation to support ideas she disagreed with, however, she did have an obligation to follow her supervisors' instructions to address certain issues in the options paper. For example, Jenkins' supervisors wanted her to address the stigmatization issue. While Jenkins acknowledged in her testimony that stigmatization is a "genuine concern" (TR 148), she refused to address this issue in the paper because she believed it had "nothing to do with the criteria for listing hazardous wastes" (CX 32 at 5). This was not her decision to make.

Jenkins' position was clearly frustrating to her superiors. She was repeatedly asked to address certain issues in the paper and she repeatedly refused to do so. Straus believed that her draft of the paper was "biased" and lacked a "fair analysis" and he asked her to write the paper again. Jenkins refused again on the grounds that she believed that analyzing the stigma issue as it related to listing wastes was illegal and wanted to ask the Office of General Counsel for their opinion on the issue. Lowrance, the division director of the Office of Solid Waste, was frustrated by Jenkins' position as well. Lowrance testified that she did not think it appropriate to contact the Office of General Counsel at that point because OSW was only examining options and the OGC eventually reviews all final regulatory proposals. She made comments on a memo by Jenkins that "it is not illegal to consider programmatic policy factors" and even wrote "This is silly -- what is in an options paper is a policy call - not a legal one" (CX 39). Jenkins' supervisors felt that her drafting of the options paper never adequately addressed the stigma issue and had other problems, and ultimately removed her from the project (CX 43).

The events that led to Jenkins' removal from the wood preserving project illustrate her inability to relate to others in her workplace and to follow the instructions of her supervisors if

she disagreed with them. These are problems that continued throughout the time period concerning this case. Her approach to her work on the options paper and the listing project reveals Jenkins' belief that she was right, her supervisors were wrong, and therefore she need not heed the instructions she was given. To say the least, this does not facilitate a good working relationship. All of her supervisors at this time -- Scarberry, Straus, and Lowrance -- gave Jenkins extensive feedback on the options paper and were quite generous in providing her numerous opportunities to re-draft the paper so that it would address the options they felt needed to be addressed. Lowrance, who is an attorney, teaches classes at Catholic University's law school, and, more importantly, was the top supervisor in OSW, informed Jenkins that simply addressing issues in a paper, which is not a final regulatory proposal, was not illegal. Lowrance testified credibly that she believed and continues to believe that "policy work and technical work should be done looking at a broad array of options and variables in the agency" (TR 1710). This is a point Jenkins failed to understand, as she continued to insist, even at the hearing, that addressing the stigma issue in the options paper was illegal.

Most, if not all, employees disagree with their supervisors at some point in their careers. During the many opportunities Jenkins was given to re-draft the paper, she could have, at any point, addressed the issues she was instructed to by her supervisors and formally noted her disagreement with their position. Instead, she refused to address these options at all. Jenkins' refusal to write the paper in a manner consistent with her supervisors' instructions caused a significant delay in developing the regulatory package. In order to alleviate that delay and facilitate the process, she was removed from the paper and the project. This removal was not in retaliation for any protected activity, but rather was based on her refusal to address issues that her supervisors ordered her to examine. That type of refusal is not protected by any of the environmental whistleblower statutes. Furthermore, the record clearly demonstrates that Jenkins' participation in protected activities during this period -- for example, writing letters to Congress -- in no way precipitated her removal from the paper or the listing project. Rather, her removal was precipitated by her own refusal to perform the work required of her.

b. Denial of Within-Grade Increase, Unsatisfactory Performance Evaluation, and Change in Performance Evaluation

The denial of Jenkins' within-grade increase and her unsatisfactory performance evaluation were based on many of the same reasons that she was removed from the wood preserving paper and project, namely her poor performance. Scarberry's memo addressing the denial of the salary increase explained that he expected a "GS-13 professional . . . to be able to work independently and come up with a satisfactory product . . . ." (CX 65 at 1). The memo continued, stating:

> I have to give you specific work instructions, and your products have to be rewritten with substantial revisions in order to be acceptable. Your work is generally completed late, and I have expressed to you on several occasions over the past two years, both orally and in writing, my concern over the quality and timeliness of your assignments. As a result, an abnormal amount of my time has

> been used in providing detailed instructions as well as rewriting/editing your technical assignments. After these discussions, guidance, and recommendations, there has been no demonstrable improvement in your work performance.

CX 65 at 1. The record supports Scarberry's statements in this memo. Both Jenkins and Scarberry testified that they had numerous meetings over Jenkins' work. Numerous drafts prepared by Jenkins have extensive comments written on them. While these comments by themselves are not necessarily probative as to the quality of Jenkins' work, the fact that almost all Jenkins' drafts required extensive re-writes is probative. Jenkins is a high-level professional and her work should not have needed the close supervision that it did. Furthermore, Scarberry's statement that Jenkins consistently missed deadlines is also supported by the record.

Jenkins's difficulty in meeting deadlines and communicating effectively with her supervisors is demonstrated by her December 1, 1986 memo stating that she would re-draft a document and turn it in to her supervisors in "two weeks or so" (CX 13). However, Jenkins did not turn in this draft until early February (TR 1846) (*see supra* pages 25-26). Jenkins' refusal to address certain issues in the options paper was another legitimate performance related problem.

Thus from September to November 1987, the record is replete with performance related concerns from her supervisors before, during, and after she engaged in protected activity. If anything, the record reflects that Jenkins' supervisors were extraordinarily generous in providing her many opportunities to improve her work; when no improvement was seen, these adverse actions followed. Therefore, I find that complainant's removal from the wood preserving paper and project, denial of salary increase, and unsatisfactory performance evaluation were not acts of discrimination based on protected activities, but rather actions taken because of Jenkins' poor work performance.

Finally, that Jenkins ultimately was granted a within grade salary increase and given a satisfactory performance evaluation by Lowrance was not an adverse action. Lowrance credibly testified that she did this because she was leaving her position and she wanted the issue put aside so that the slate would be clean for her replacement. Though Jenkins contends that not raising her evaluation to "exceeds expectations" is an adverse action, I disagree. Jenkins' supervisors had legitimate, well-documented performance problems with complainant's work, such that her performance did not deserve even a "fully satisfactory" rating, let alone an "exceeds expectations" evaluation. In fact, the decision by Lowrance to grant Jenkins a salary increase and raise her performance evaluation was made in an effort to put the issue to rest so that the office would be more harmonious and better able to perform its work, rather than an effort to commend Jenkins for her work performance.

4. Merits of 1988-1989 Allegations

Complainant next contends that during 1988 and 1989 she was subject to the following adverse actions:

6/10/88: Reassignment to report to branch chief, removal of Listing Section to another branch within 3 months of reassignment, resulting in isolation

11/87 - 6/88: Imposition of IDP

12/88: Satisfactory rather than exceeds expectation performance rating

1989 - 1989: Period of no duties and isolation

Compl. brief at 177.

a. Reassignment to New Supervisor

The first alleged adverse action, reassignment to a different branch chief, was a decision to which Jenkins agreed. Barnes, the new director of the Character and Assessment Division, thought Jenkins might work more productively than she had under Scarberry if she was reassigned to Dellinger, who he believed was an excellent supervisor (TR 1732). While Jenkins testified that she did not believe that she agreed to this transfer, but rather that she "chose the lesser of two evils or three evils or four evils," the record reflects that Jenkins had input into this decision (TR 1138). In fact, Barnes offered Jenkins the option of working directly for him, but she turned that option down so she could continue with her listings work (TR 598-99). Hence, Jenkins was given a choice of whom to work for other than Scarberry and she chose Dellinger over Barnes.

This reassignment was designed to remove Jenkins from working with a supervisor who she clearly did not respect and with whom she had difficulty working. It is not credible that Jenkins would want to continue working for a supervisor against whom she had made such serious accusations as sexual harassment and forgery. Barnes took these accusations into account and no doubt also considered the stressful work situation that resulted between Scarberry and Jenkins when he decided to reassign her. Barnes' attempt to place complainant in a more amenable supervisory situation where it was hoped she could work more comfortably and productively clearly was not a punitive measure. Accordingly, I find that her reassignment to another supervisor was not an adverse action and in any event was not in retaliation for protected activity.

b. Reorganization of Office Resulting in Isolation

Complainant next states that she was subject to an adverse action when the listings section was removed from her branch and moved to another branch in 1988, which allegedly resulted in her isolation. During the time period in which the isolation was alleged, the office

was reorganized as a result of an unanticipated medical waste crisis (TR 1803-04).[12] One of the results of the reorganization was that the listing section was removed from Dellinger's supervision and transferred to another branch within the division (TR 1805). Jenkins suggested that she be transferred to the branch where the listing section was located, but Barnes denied this request because the chief of that branch was in the process of leaving and it was anticipated that Scarberry would become the new branch chief (TR 1806). After this re-organization, Jenkins continued to work on listings projects (TR 1807-08).

Jenkins has failed to show that the removal of the listing section from her branch and the following denial of transfer to where the listing section was located was discriminatory. First, the reorganization was precipitated by a crisis having nothing to do with Jenkins. Second, Barnes had legitimate reasons to want to prevent Scarberry and Jenkins from working together. He described their relationship as "dysfunctional" and "impeding the flow of work in the division" (TR 1731-32). It is reasonable that he would not want to recreate that situation by again placing Jenkins under Scarberry's authority. While the circumstances under which Jenkins was performing listing work may have been unique, for she was the only one in her branch doing listings, Jenkins' situation was unique because of the difficult relationship that had developed between her and Scarberry. Accordingly, I find that the failure to transfer Jenkins to the branch performing listings work and any resulting isolation was not discriminatory.

c. Imposition of IDP

Complainant next contends that the imposition of an Individual Development Plan (IDP) from November 1987 to June 1988 was an adverse action. First, the record indicates that Jenkins was only subject to an IDP from December 2, 1987 to January 31, 1988 (CX 72). Second, EPA policy required that Jenkins be placed on the IDP after an unsatisfactory performance evaluation *(id.).* As discussed above, I found that the unsatisfactory performance evaluation was based on Jenkins' work-related performance problems, not retaliation for protected activity. Therefore, placing her on an IDP was not only justified because of her performance problems, but required by EPA policy. Because the goal of an IDP is to give the employee the opportunity to demonstrate her fitness for government service, it should not be viewed as an adverse action. However, even assuming that it was an adverse action, placing her on the IDP was clearly not motivated by discriminatory reasons, but rather by her performance problems and EPA policy. Accordingly, I find that Jenkins has failed to establish that placing her on the IDP was based on her participation in protected activities.

d. FY 1988 Performance Rating

[12]Dellinger testified that during the summer of 1988 medical waste began to wash up on the shores of New Jersey and New York. As a result of this crisis, Dellinger was made responsible for supervising all activity regarding a newly created medical waste project.

The December 1988 performance rating of "fully successful" rather than "exceeds expectations" is the next alleged adverse action.[13] Scarberry testified that while he viewed Jenkins' performance as unsatisfactory in the beginning of the year, he thought her work had improved as the year progressed (TR 1868). He stated that he believed her work became minimally satisfactory during the time period in which he was her supervisor, which was from October 1987 to June 1988 (TR 1869). Dellinger testified that he rated Jenkins as "exceeds expectations" for the time period in which he supervised her, June 1988 to September 30, 1988. Therefore, averaging the two evaluations, Jenkins was given a "fully successful" rating for this time period. Jenkins has not shown how a "fully successful" rating in this situation is an adverse action or why she would have been entitled to a higher rating.

e. Period of No Duties and Isolation 1988 - 1989

Complainant's next asserted adverse action is that from 1988 to 1989 she was subjected to a "period of no duties and isolation" (Compl. brief at 177). The record does not support this contention, but instead shows that complainant was given appropriate job duties during this period. Jenkins did testify that from June to August of 1988 she did not meet regularly with her supervisor to discuss her work. However, her supervisor at this time, Dellinger, testified that he was responsible for handling an unexpected medical waste crisis during this time period (TR 1803). Dellinger explained that Jenkins was responsible for working on "at least two hazardous waste" listings during 1988 (TR 1807-08). Jenkins testified that she also worked on a solvents exemptions project in 1988 (TR 1261). In May of 1989, Jenkins wrote a letter to Dellinger stating that she was overburdened by her workload.

> As I told you on May 23, my first priorities will not be any HSWA listing work, but instead pursuing my EEO and DOL complaints. This means that any anticipated milestones that you set up must slip considerably, especially considering the fact that I will need to spend significant time with a District Court suit to force EPA to complete my EEO investigative file during the months of May, June, and July. Your assignment of the inordinate work load of both UDMH, methyl bromide, and chlorinated aliphatics becomes even more infeasible in light of these other duties.

CX 241. In light of the above evidence, I find that Jenkins was not subject to a period of "no duties" in the 1988-1989 period.

4. Merits of 1990 -1991 Allegations

a. Removal from Solvents and UDMH II Listing Projects

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[13]While complainant's brief states the lower rating was "satisfactory," the record reflects that the lower rating was "fully successful" (CX 224-B).

The next adverse action asserted by complainant was her removal from the solvents and UDMH II listing assignments on August 30, 1990 (Compl. brief at 177). Assuming this was an adverse action, Jenkins cannot show that the motive for removing her was discriminatory. Jenkins claims that she was removed from this project because she raised the possibility of the presence of dioxins in solvents other than the four that had been listed by the contractor (CX 267). Petruska testified that confusion existed over the meaning of the HSWA and that he believed the statute meant for the EPA to conclude solvents listing work that had already commenced at the time of HSWA's passage (TR 1583). Jenkins disagreed strongly with this position in a memo (CX 270).

Petruska forwarded this memo to Scarberry and Abrams and asked if they had "any thoughts." Abrams replied, stating in part "[i]t depends whether we want to satisfy the HSWA statute or make work for Cate with an unlimited budget for dioxin analysis" (CX 271). Jenkins prepared a $24 million proposed budget to study new solvents listings. Her supervisors responded to this proposal with statements such as "this is absurd" and "this is a farce" (CX 273 A). In a later memo concerning the solvents II project, Petruska stated we "don't need more data" and later informed Jenkins that she should focus her work on the four solvents that had already been listed. Complainant wrote a July 25,1990 memo stating that the UDMH Listings, Olin Process should be tested for dioxins "in the absence of definitive data to rule out their presence" (CX 260). Her supervisors disagreed. Finally, on August 30, 1990, Petruska told Jenkins that while she could continue work on the UDMH listing, she should stop work on UDMH II because "[w]e may take the position that given the lack of data on the Olin process, that this is not a HSWA listing" (CX 261).

For the purposes of this decision, even assuming that Jenkins' actions regarding this project were protected and that removing her from the project was an adverse action, the EPA had legitimate, non-discriminatory business reasons to do so. First, the decision to list or not list a solvent was in many ways a political and a policy decision based on how HSWA was interpreted. Though Jenkins clearly believed, and continues to believe, that only her interpretation of HSWA was the proper one, alternate theories of what HSWA required were permissible and certainly not illegal. Jenkins' supervisors were ultimately responsible for deciding what initially should be listed, not her. Second, the only option advocated by Jenkins, more testing, required an expenditure of $24 million. Her supervisors believed complainant's proposal of spending that amount of money on additional testing was misdirected and they wanted to proceed with the listing process without additional testing, delay, and cost. Finally, as Petruska's memo indicates, OSW was investigating whether UDMH II should even be listed under HSWA. Therefore, in light of OSW's position regarding HSWA, as well as Jenkins' contrary position, her supervisors removed her from the project. This was a legitimate, non-discriminatory reason to remove Jenkins from the UDMH project.

b. Period of Isolation and No Duties, 1990 -1991

Complainant alleges that from 1990-1991 she faced another period of no duties and isolation which constituted an adverse action. This assertion cannot be supported regarding her

activities in 1990. She worked on both Uniroyal's UDMH listing and UDMH II until August 30, 1990 at which point she was removed from UDMH II but continued work on the Uniroyal listing. Complainant also interacted significantly with the public during this time period, which she argues was a part of her official duties (Compl. brief at 135). She was interviewed in connection with a criminal investigation of Monsanto in February and November of 1990 and wrote a follow up memo regarding Monsanto in January 1991. Accordingly, I find that complainant was not subject to a period of no duties and isolation in 1990.

After January 1991, however, Jenkins did experience a period where she was assigned no duties. This was confirmed by Petruska as being unusual (TR 1491-92). One of the reasons Jenkins had no duties during this time period was due to the fact that her supervisors decided she should not work on any listings involving Monsanto products (TR 1554-56). Even assuming that the no work period was an adverse action motivated in part by Jenkins protected activities involving Monsanto, the EPA had a legitimate, non-discriminatory business reason to not assign her to any work involving Monsanto products.

Prior to the time of Jenkins' period of no duties, she engaged in several interactions regarding Monsanto. In February of 1990, she wrote the chair of EPA's Science Advisory Board alleging that Monsanto had fraudulently prepared an epidemiological study. The information contained in this letter was based on a plaintiff's brief in a suit against Monsanto. She worked with Vietnam veterans groups and Congress regarding dioxin exposure and the Monsanto study. She met with two agents from the National Enforcement Investigations Center about her fraud allegations concerning Monsanto. She wrote two follow-up memos after the meeting describing how she believed the allegedly fraudulent study affected EPA's regulatory process and sent copies to outside parties. One of the investigators contacted her after she sent out her first memo and asked that she not reveal the ongoing criminal investigation of Monsanto, to which she responded she could not comply. Petruska testified that he considered disciplining Jenkins for revealing an ongoing criminal investigation because doing so violated EPA policy. Monsanto wrote several letters to the EPA expressing their concern over Jenkins' actions. The Department of Justice, EPA's Inspector General's office, and EPA's Office of Enforcement all investigated possible personnel actions that could be taken against complainant for revealing this information and violating EPA policy (TR 74, CX 326).

Because of these incidents, it would have been foolhardy for Petruska to have assigned Jenkins work concerning Monsanto products. He testified that he was concerned that Monsanto might have a legal basis to challenge any listings that Jenkins worked on because of the "appearance that she wasn't completely objective" concerning Monsanto (TR 1555-56). He further stated that a person doing listing work must have a good relationship with the industry and that he thought that would not be the case if Jenkins was working on a listing project involving Monsanto (TR 1603). Therefore, I find that the decision to not place Jenkins on any Monsanto listing projects, which was part of the reason Jenkins had no work in 1991, was based on legitimate, non-discriminatory reasons.

There were other reasons why Jenkins was assigned no duties during 1991 that were

acknowledged in complainant's brief. First, three potential listing projects were ruled out because Petruska decided either that more data was not needed for the listing or that the particular waste need not be listed (TR 1560-62). Second, complainant's participation in another dye and pigment listing was ruled out because she had once alleged the industry had made threats against her (TR 1491). Her supervisors decided this was a reason not to assign Jenkins to dye and pigment work (TR 1491). These reasons support the conclusion that Jenkins' "no-work" period in 1991 emerged from Petruska's legitimate concerns, rather than malicious or discriminatory intent.

5. Merits of 1991 Allegations

> Jenkins final contentions are:
>
> 4/29/91: Retroactive imposition of a clause in performance standards requiring adherence to an unpublished unavailable policy on communications
>
> 10/29/91: Satisfactory rather than exceeds expectations performance evaluation based on alleged non-adherence to policy on communications.

Compl. brief at 177.

Jenkins did not receive her final performance standards for FY 1991 until April or May of 1991 (TR 737-38). When she received them a requirement had been added stating "Agency policies concerning communicating with the public are followed" (CX 334 at 6). Petruska agreed that this clause was put into her standards after she had already revealed the criminal investigation of Monsanto to the public. Adding this criteria was not an adverse action.

By adding the criteria, Petruska was ensuring, in a formal manner, that Jenkins was notified of the communications policy and the importance of adhering to it. Jenkins claimed at the hearing that she was not familiar with the communications policy prior to April, a contention that is not credible in light of her testimony that she would regularly read through files to determine what EPA policy was on various subjects and because she had been involved previously with investigations. Furthermore, Petruska testified that he thought Jenkins should have been aware of the policy and not disclosed the information to the public. However, because Jenkins insisted that she was not familiar with the policy, Petruska took the formal action of inserting a provision requiring her adherence to it into her performance standards. That was not an adverse action, but rather an action motivated by the need for Jenkins to understand and adhere to EPA's communications policy.

Finally, Jenkins' allegation that the October 29, 1991 performance rating of "fully successful" rather than "outstanding" was an adverse action cannot be supported. Jenkins contends that this rating was based solely on her non-adherence to communications policy. However, Petruska testified credibly that the evaluation was based on a number of factors, including adherence to communications policy (TR 1600-01). Subsequent to the addition of the

communications policy criteria to her performance standards, Jenkins again violated the communications policy by publicly discussing the Monsanto investigation (CX 324). Therefore, rating her performance on that criteria as "unsatisfactory" was reasonable (CX 334). Furthermore, Jenkins' ratings in most other performance areas for that evaluation were "fully successful" rather than "outstanding." Therefore, a "fully successful" evaluation was not an adverse action because it was based accurately on Jenkins' performance during this period.

C. Conclusion

In sum, complainant has failed to prove that the respondents discriminated against her due to activity protected under the any of the six environmental statutes. Any adverse actions taken against the complainant from 1987 to 1991 were taken for legitimate business reasons and were not retaliatory. Therefore, it is recommended that this case be dismissed in its entirety.

RECOMMENDED ORDER

On the basis of the foregoing, it is recommended that the case of Dr. Cate Jenkins be dismissed in its entirety.

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JEFFREY TURECK
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).